Supreme Court, U.S.
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No. ———

In The
Supreme Court of the United States

DERRICK HILLMAN AND DALLAS HILLMAN,
Petitioners,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Ohio Court of Appeals for the Ninth Judicial District

PETITION FOR WRIT OF CERTIORARI

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January 26, 2009

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QUESTIONS PRESENTED FOR REVIEW

I

Once a consensual search conducted in the wake of an investigative stop has concluded is probable cause required to justify any further detention?

II

Once a consent given to allow a search can it be revoked at anytime before the search commences?

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To the Honorable, The Chief Justice and Associate Justices Of The Supreme Court Of The United States:

The Petitioners, Derrick Hillman and Dallas Hillman, respectfully pray that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals for the Ninth Judicial District, originally journalized in this case on June 30, 2008, and made final by order of the Ohio Supreme Court on October 29, 2008, when that Court denied further Appellate review.

OPINIONS BELOW

The Order of the Ohio Supreme Court is designated as **Appendix "A"**. The Opinion of the Court of Appeals, affirming these convictions, is included in the Appendix as **Appendix "B"**. The decision of the Trial Court, denying the "Motion to Suppress" illegally seized evidence, is **Appendix "C."**

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment by the Court of Appeals was finalized on October 29, 2008 when the Ohio Supreme Court denied further Appellate review. So postured, the jurisdiction of this Court is invoked under **Title 28 U.S.C. 1257 (3)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the United States Constitution involved in this case are the search and seizure clause of the Fourth Amendment and the self-incriminating clause of the Fifth Amendment. The pertinent text of these read, and the other relevant Amendments read as follows:

> **Amendment IV:**
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

> **Amendment V:**
> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

> **Amendment VI:**
> [i]n all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

in his favor, and to have the assistance of counsel for his defense."

Amendment XIV:
"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts here are clear-cut and easily stated. On November 14, 2005, Derrick Hillman and Dallas Hillman were motorists, in Wooster, Ohio (**Appendix "B,"** ¶2), when they were stopped by law enforcement officers. This agent of the Drug Enforcement Agency ("D.E.A.") testified he had been told by a source, with whom he had some slight familiarity with (based on s single episode). **Tr., p. 5**. This alleged person was credited with having told the agent that Dallas Hillman (the passenger in the described vehicle) was transporting narcotics (**Appendix "B,"** ¶2). Nothing was said as to how this source came to know this. Thus, it is significant here that no other justification for this stop was even offered by the State.

The facts further show that when the stop was made, the Hillman brothers were required to exit the vehicle and it was said they were subjected to more than one **Terry** type search of their persons. (**April Tr., at pp. 7-8, 29-31 & 40**.) Nothing was found in the wake of these several searches (**id., pp. 39-40**). Despite this, it was said that Derrick Hillman consented to a search of his vehicle for drugs. And, of course, none were found. (**Appendix "B,"** ¶3.) The proof also shows the brothers were then handcuffed

and placed in separate police vehicles. Their vehicle having already been searched, the brothers were further detained at the scene awaiting the eventual arrival of the "drug dog" (**Id., ¶4**).

Significant here, as well, after the dog alerted (so they say) the vehicle was again searched (**ibid**). (Also see **Tr., pp. 9, 27, 37-38 & Appendix "B,"** ¶4.) Sometime after this second search of the vehicle, it was said that one of the officers present spoke with the alleged informant. Supposedly this person told this officer that if the drugs were not in the car they could be on their persons. (**Id., ¶5.**) Indeed, in the wake of the alleged source's naked and unclad opinion, related above, it is clear the calculated decision to take the brothers to the police station for a strip search was made in desperation. It was made without regard to a number of serious tenets and facts. This search was conducted and yielded the contraband centralized in this case.

II

Most significant here, the trial Court *did not* find, as he most assuredly should have, the arrest of the brothers actually occurred before they were taken to the police station. What the Court actually did find was that the officers lacked any probable cause to arrest, but they were nonetheless transported to the police station. (**Appendix "C," p. 17a.**) Still, the trial Court did not find they had consented to being taken to the station and to being strip searched. What the trial Court did say was: the officers, in the wake of the belated call from the informant then "needed to do a strip search." (**Id., p. 18a.**) Significant here, contrary to the thrust of these rulings the Court of Appeals

somehow expressly found that although the brothers were not under arrest, they actually consented to these searches. Our position is they were under arrest and they did not consent to any search. The Court of Appeals did credit our Petitioners with having withdrawn a previous consent before capitulating.

Of significance here, because clearly it must be reckoned with by the Court, are the dispositive findings of fact that were, arbitrarily in our judgment, made by the Court of Appeals. Distilled the Court of Appeals "found" (1) the police were justified in pulling the vehicle over, based on the informant tip; (2) the continued detention of the Petitioners, who were placed in handcuffs, was proper and did not result in a *de facto* arrest; and (3) that having originally consenting to being transported to the police station to be strip searched "they should not be heard . . . to complain . . . [their detention] was unreasonably extended . . ." (**Appendix "B," ¶24**.) And, the Court found (4) that Petitioners could not withdraw their earlier consent to the strip search. And, for that reason, the searches were consensual (**Appendix "B," ¶¶21-29**).

Now, in this case, regardless of whether the State, if it bothers to respond to this Petition, or duplicates its original arguments, or simply adopts the position taken by the trial Judge, or the ones taken by the reviewing Court, one thing is certain. The position taken will be indefensible.

In any event, it is beyond dispute, the Record shows, as the Court of Appeals conceded the time elapsed between the stop and the strip search was approximately one (1) hour and twelve (12) minutes.

(**Appendix "B," ¶10.**) The Court of Appeals, upon consideration of the contention that the trial Court had erred in failing to grant the Motion to Suppress, the Court of Appeals found ruled the Petitioners had consented to being searched.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Absent probable cause to arrest, and absent any basis for a belief that criminal activity is afoot, the authorities lack any constitutionally sufficient basis for stopping a motorist. This is really Hornbook Law. What makes the issues here so very significant is that, the trial Court's finding that the officers lacked "probable cause to arrest the defendants for possession of drugs after"they completed their searches there on the street. (**Appendix "C," at p. 17a.**) Yet, it is clear the police continued to hold them. With this holding as a given, despite holding the only further information that had been acquired after the officers failed to locate any drugs in the wake of these earlier searches was alleged source's statement that "the drugs were probably taped to the defendant's testicles" (**id., p. 18a**), this unassailable finding is compellingly significant. It shows they were being held without probable cause.

Given the detention on the street was said to have lasted more than "1 hour" (**ibid**), and given the State's argument (with which we agree) that the arrest occurred before they were strip searched (**id., p. 17a**), which was rejected by the trial Court, the question that arises is: can the Court of Appeals, with impunity, reject any of the trial Court's finding of fact and not

only do so with impunity, but substitute its own - -as it did.

Of critical significance here, is the precise finding by the trial Court: that although the police had an alert by a drug dog on the car, they had not been able, after an hour or so of looking, to find any drugs. (**Appendix "C," at p. 18a**.) And, it was determined by that Court that these officers were then told, by their informant, the drugs they were looking for were "*probably* taped to the defendants' testicles." (**Ibid**.) (*Emphasis supplied*.) Likewise significant here, is the finding the Court of Appeals made that at the police station, both, Petitioners had refused to consent to being searched. Indeed, as the Court put it: "when they arrived at the Justice Center, the Hillmans initially stated they would not consent to a strip search . . . [but] finally agreed." **Appendix "C," at p. 5a**. The contraband here involved was then located on the persons of these Petitioners.

Here, of course, to fully assay the import of the search issues in this case, here submitted is the following quote from the **Brief in Support of Motion to Suppress** (filed with the trial Court *following* the Hearing had on the Motion to Suppress). It aptly postures the issues for this Court - - as it should have for the Courts below. Here, counsel argued in his written submission:

> **The State has presented evidence that a subsequent conversation between the informant and Agent Ellis justified the continued detention and strip search of Defendant.** Defendant respectfully disagrees with the State's position. The informant's

> alleged statement that drugs may be on the Defendant's person does not qualify as additional substantive or relevant information with regard to the specific issue before the Court. First, informant had no personal knowledge that Defendant had placed any drugs on his person. Informant was allegedly contracting Agent Ellis from Columbus, Ohio and was not present on the scene. Second, informant testified that he made this alleged statement to Agent Ellis based on his history as a drug dealer. Agent Ellis himself testified that it is not abnormal or uncommon for a person who is transporting drugs to have them in a vehicle or on his person. (See Transcript - April 25, 2006, Page 20-21). The alleged subsequent conversation with informant provided no case specific "information" to police, rather it was merely a statement of common knowledge well known to any police officer. The subsequent "information" did not create probable cause to arrest the Defendant for the above stated reasons.

Brief in Support, filed in the trial Court on September 6, 2006, **at, pp. 4-5**.

Despite the cogency of the unassailable showing made above, and despite the Court's recognition of the prolonged, indeed inordinate delays that ensued (between the original stop and the strip search), and given the inconfutable lack of consent, it was nonetheless said (for different reasons) these search were nonetheless lawful. Indeed, as argued below, and here, the flaws in the Court's resolutions of these issues cannot survive meaningful scrutiny.

ARGUMENT NO. I

EVEN ASSUMING THE INVESTIGATIVE STOP MADE HERE CAN BE JUSTIFIED ON THE BASIS OF INFORMATION SUPPLIED BY AN ALLEGED INFORMANT, AFTER THE OFFICERS CONCLUDED "THE STREET PART OF THE INVESTIGATION."[1] ANY FURTHER DETENTION OF THE MOTORIST AND HIS PASSENGER REQUIRED PROBABLE CAUSE TO ARREST.

Significant here, it is clear the trial Court is *credited* with having concluded the Hillmans "were not in custody until the strip searches were performed." (**Appendix "C," at p. 13a**. This follows because in actuality counsel-opposite, as was her prerogative, made the argument 0that the officers had probable cause to arrest the brothers on the when they were originally stopped (**id., p. 17a**). As the trial Court put it, counsel's argument was this was so, because "the informant's information was verified, [and the officers] had a positive alert from a properly trained and certified drug dog, and Agent Ellis had been told [albeit much later] the drugs were taped[2] to the genitals of the defendant." (**Ibid**.)

---

[1] This quote was lifted bodily from the trial Judge's Opinion. (See **Appendix "c," p. 17a**.)

[2] This latter statement was shown yo have been made after more than an hour had elapsed and (even then) it was only said that: quite possibly this was where the drugs were. (**Appendix "B," pr. 5**.)

Arguably all contacts between citizens and the police, especially on a public street are inherently coercive, and given there were at least seven (7) law enforcement officers, with four (4) vehicles at this stop (**tr., pp. 7, 8, 18, 19, 37 & 41**). This showing in turn must be coupled with the fact that it was for more than an hour that these brothers were detained in restraints there on the street (while seated separately in a police car). With this being so, who can say what effect all this had on them. So postured, to believe these individuals consented to this treatment can be likened to believing in the tooth fairy.

With this being so, the fact that no one can even divine from the clashing positions taken by the prosecutor before the trial Court and the contrary positions taken by the trial Court and the reviewing Court on an acceptable legal basis for the denial of the Motion to Suppress, is already alarming. This follows because clearly anyone given a lengthy sentence, the case here, should have the satisfaction of knowing the Courts involved were not only aware of the controlling constitutional tenets involved in their case, but that they were applied to their case.

Having said that, one thing seems most clear here is the fact the police lacked probable cause to extend the detention once the searches made there on the street had been concluded.

ARGUMENT NO. II

WHERE THE VALIDITY OF A SEARCH RESTS ON CONSENT, THE PROSECUTION MUST SHOW ANY CONSENT SAID TO HAVE BEEN GIVEN SURVIVED ANY EFFORT TO WITHDRAW SUCH ALLEGED "CONSENT".

As the Court of Appeals saw it, contrary to the trial Court's insinuation that this was "a traffic law violation" (**id., p. 10a**), this was wrong, Yet, that Court somehow reached the conclusion that the bottom line here was that eventually the Hillmans **did consent to being searched**. On the other hand, it seems clear here, indeed it is beyond dispute, that the State did not even attempt to prove, in accordance with it burden of proof in these circumstances, these Petitioners freely and voluntarily consented to being searched. This becomes all the more compelling in light of the following quote from the Opinion. Here the Court wrote that at the police station the Hillmans had originally stated "they would not consent to a strip search." (**Id., p. 11a**.) Despite this clarity, as the appeals Court put it, "having [originally] given their consent [to being searched] they should not be allowed to now complain that this unreasonably extended their detention." (**Id., p. 11**.)

In making this oraculated argument, clearly the Court must have been confounded. And this, by the fact that even assuming consent was originally given (if it was), once it was withdrawn that could not have ended the detention. On the other hand, several facts and factors are clear with reference to the Opinions rendered below. Neither one of these Courts held their

was probable cause to strip search these brothers. Indeed, more than an hour after they were stopped and their vehicle throughly searched to no avail. Significant here, as the Court of Appeals put it, the Hillmans having consented to the strip search; hence "the officers did not need" anything else. **(Id., pp. 7a-7b & 12a-14a.)** Clearly, the Court is saying that having consented (if they did) to being taken to the station to be searched, they could never withdraw that consent. Given the ease with which one can withdraw their consent to being questioned, with or without an attorney, it would be strange indeed, if it were otherwise when you are dealing with a consent to search.

Now, as we see it the law is clear enough, or it ought to be. Any consent given to a search can be withdrawn at anytime prior to a completion of the search. This only makes sense if, as we know to be the case, an accused can withdraw the waiver his right to counsel during an interrogation. Indeed, he can also reassert his right of silence at any time. In support of our position that "consent" can be withdrawn at any time before the search starts consider ***United States v. Springs*, 936 F.2d 1330 (D.C. Cir. 1991)** and ***United States v. Carter*, 985 F.2d 1095 (D.C. Cir. 1993)**. These cases makes the point that even if consent was initially given it may be withdrawn at anytime prior to the completion of the search. In further support of position that consent can be withdrawn at anytime before the search starts consider ***Mason v. Pulliam*, 557 F.2d 426, at 428-429 (5th Cir. 1997)**. Also see ***United States v. Springs*, 936 F.2d 1330, at 1334 (D.C. Cir. 1991)** and ***United States v. Ward*, 576 F.2d 243, at 244 (9th Cir. 1978)**.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 2008-1519

[Filed October 29, 2008]

State of Ohio	)
	)
v.	)
	)
Derrick Hillman and Dallas Hillman	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Wayne County Court of Appeals; Nos. 07CA0048 and 07CA0049)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX B

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C. A. Nos. 07CA0048, 07CA0049

[Dated: June 30, 2008]

STATE OF OHIO	)
	)
Appellee	)
	)
v.	)
	)
DERRICK HILLMAN	)
and	)
DALLAS HILLMAN	)
	)
Appellants	)
	)

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE Nos. 05-CR-0488 05-CR-0489

DECISION AND JOURNAL ENTRY

CARR, P. J.

Appellants, Derrick and Dallas Hillman, appeal from their convictions and sentencing in the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶1} On November 15, 2004, Senior Agent Charles Ellis of the Medway Drug Enforcement Agency ("Medway") received information from a confidential informant that Dallas Hillman and another black male would be arriving in Wooster around 1:00 p.m. that day driving a black Lincoln Navigator. According to the informant, the two men would be transporting crack cocaine from Cleveland to sell in Wooster. The informant gave Agent Ellis an address of a residence where the two men were going to be dropping off the drugs. Agent Ellis recognized the address as the residence of Michael Hall. Agent Ellis knew that Hall had previously been convicted of drug trafficking. Based on his past experience with this informant and the fact that Medway had worked successfully with this particular informant on multiple occasions in recovering contraband, Agent Ellis considered him to be reliable.

{¶2} Agent Ellis contacted the Wooster Police Department for assistance. Wooster Police put the residence under surveillance. Around 1:00 p.m., the informant contacted Agent Ellis to let him know that the two men would be arriving approximately one-half hour to one hour late. Around the time the two men were to arrive, Wooster Police observed a black Lincoln Navigator with two black males inside approaching Wooster. The police ran the plate, and the registration belonged to a resident of Cleveland. The police followed the vehicle to Hall's residence and pulled it over.

Derrick Hillman was driving the vehicle and Dallas Hillman was in the passenger seat. The police explained to the men that they had received a tip that they were transporting drugs into the area for sale. The two men complied with the officer's request that they exit the vehicle. Upon exiting the vehicle, the Hillmans were searched. When asked, the two men stated that there were no drugs in the vehicle.

{¶3} Agent Ellis asked Derrick Hillman for consent to search the vehicle for drugs; Derrick consented to the search. Derrick and Dallas were questioned separately regarding their reason for being in the area and they gave conflicting stories about why they were there – one said it was to go shopping and the other answered that they were there to meet a guy to build something.

{¶4} During the initial consent search of the vehicle, Officer Brian Waddell, a member of the City of Wooster's canine unit, was contacted to bring his drug dog to search the vehicle. No drugs were found in the vehicle by the officers, but the dog became more aggressive walking around the outside of the vehicle and alerted on an inside panel of the vehicle. Officer Waddell indicated that because the dog did not have a strong reaction, the drugs may not be in the car but they were probably with the passengers. Because of the dog's alert on the vehicle, the police searched it again.

{¶5} During the second search of the vehicle, approximately 15 to 30 minutes after the initial stop, Agent Ellis spoke with the confidential informant who had paged him. The informant told Agent Ellis that if

the drugs were not in the vehicle, the two men usually kept the packages taped to their testicles.

{¶6} At some point during these events, Michael Hall approached one of the police cruisers to speak with Dallas. Agent Ellis testified that the police knew Hall to be involved in drug trafficking in the area. According to the confidential informant, Hall's residence was the Hillmans' destination with the drugs.

{¶7} Based upon the information from the informant, the conflicting stories from Dallas and Derrick, the drug dog alert on the vehicle, and Hall asking to speak with Dallas, Agent Ellis asked the Hillmans to go to the Wayne County Justice Center for a strip search; they agreed to go.

{¶8} When they arrived at the Justice Center, the Hillmans initially stated that they would not consent to a strip search and said they would fight the officers. The Hillmans finally agreed to the strip search and Dallas was searched first. After Dallas removed his clothes, Agent Ellis looked over Dallas. Agent Ellis asked him to squat down and he replied that he had a problem with his genitals. Agent Ellis then saw a clear plastic baggie sticking out from under Dallas' testicles. Agent Ellis asked Dallas to give him the baggie, Dallas attempted to get away and Agent Ellis reached down and grabbed the baggie.

{¶9} Derrick was then brought into the interview room to be searched. Upon seeing the bag of crack on the table, Derrick removed his clothes and the officers recovered two bags of crack, one small bag and a larger bag hidden under his testicles. The Hillmans were

then placed under arrest for possession of drugs and conveyance of drugs onto the grounds of a detention facility.

{¶10} From the time of the initial stop until the drugs were seized, approximately one hour and twelve minutes elapsed.

{¶11} The Hillmans were each indicted by the Wayne County Grand Jury on one count of possession of crack cocaine, a violation of R.C. 2925.11. The Hillmans initially pled not guilty and filed a motion to suppress any and all evidence seized as a result of their stop, detention, arrest, and search. A hearing on the Hillmans' motion to suppress was held on April 25 and May 9, 2006, during which Agent Ellis testified concerning the reliability of the confidential informant. The trial court denied the motion to suppress. The Hillmans subsequently withdrew their pleas of not guilty and, entered pleas of no contest. The trial court accepted the Hillmans' no contest pleas, found them guilty, and sentenced them accordingly.

{¶12} The Hillmans timely filed a joint notice of appeal with this Court on February 5, 2007. This Court dismissed the appeal for lack of final appealable orders pursuant to this Court's decision in *State v. Miller*, 9th Dist. No. 06CA0046-M, 2007-Ohio-1353. *State of Ohio v. Dallas and Derrick Hillman*, 9th Dist. Case Nos. 07CA0010, 07CA0019. The trial court subsequently issued journal entries in the Hillmans' cases which complied with our decision in *Miller*. The Hillmans then filed separate notices of appeal. Upon the Hillmans' motion, this Court consolidated the two appeals for purposes of filing the record, briefing, and

presenting oral argument. The Hillmans have set forth one assignment of error for review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION TO SUPPRESS AS THE EVIDENCE WAS UNLAWFULLY FOUND IN VIOLATION OF THE FOURTH AMENDMENT."

{¶13} In their only assignment of error, the Hillmans argue that the trial court erred in denying their motion to suppress.

{¶14} In reviewing a trial court's determination of a motion to suppress, "the ultimate questions of whether an officer had a reasonable suspicion to make an investigatory stop and whether an officer had probable cause to make a warrantless search are to be reviewed by an appellate court de novo." *State v. Gutierrez* (July 17, 1996), Medina App. No. 2515-M, citing *Ornelas v. United States* (1996), 517 U.S. 690. We review the trial court's findings of fact for clear error with due weight given to inferences drawn from those facts by judges and law enforcement officers. Id. After determining those facts known to the officer at the time of the stop, the appellate court must decide whether those facts would objectively give rise to a reasonable suspicion justifying a stop. Id.

{¶15} In their motion to suppress, the Hillmans argued that the police lacked reasonable suspicion to pull over their vehicle. The Hillmans also contend that

the tip from the confidential informant lacked sufficient indicia of reliability to justify the stop. This Court disagrees.

{¶16} A police officer may make an investigative stop of an individual if he reasonably suspects that the individual is involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 22. This standard also applies to investigatory stops of automobiles. *United States v. Brignoni-Ponce* (1975), 422 U.S. 873; *United States v. Cortez* (1981), 449 U.S. 411. "Where, as here, the information possessed by the police before the stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299. The question before us is whether the tip itself had sufficient indicia of reliability to justify the investigative stop. We consider several factors "'highly relevant in determining the value of [the informant's] report'" including "the informant's veracity, reliability, and basis of knowledge." Id. (quoting *Illinois v. Gates* (1983), 462 U.S. 213, 230).

{¶17} Agent Ellis testified at the suppression hearing. Agent Ellis testified that although he had only worked with this particular informant on one other occasion, Medway had worked with him numerous times. Agent Ellis stated that on the previous occasions, the information provided by the informant had led to the recovery of contraband such as drugs. In this case, the confidential informant identified the type of vehicle, the time the vehicle would arrive, the destination of the vehicle, the number of occupants, the identity of one of the occupants, and the location of the drugs. After

reviewing Agent Ellis' testimony, this Court finds that the tip Agent Ellis received had sufficient indicia of reliability to justify the investigative stop.

Continued Detention Was Proper

{¶18} The Hillmans next argue that, assuming the tip from the confidential informant had sufficient indicia of reliability to justify the stop, their continued detention after the initial search of their persons and of the vehicle revealed no evidence of criminal activity was improper. This Court disagrees.

{¶19} This Court first notes that the Hillmans voluntarily exited their vehicle and Derrick consented to the initial search the vehicle. During the initial search of the vehicle, the reasonableness of which is not challenged, Officer Brian Waddell, a member of the City of Wooster's canine unit, was called to bring his drug dog to the scene to perform a routine drug sniff of the vehicle.

{¶20} During the drug dog sniff, Officer Waddell's dog alerted to the vehicle. Officer Waddell informed Agent Ellis that he did not have a strong alert which indicated that the drugs were probably on the Hillmans. The vehicle was searched again after the dog alerted to it, but no drugs were found. The Hillmans complain that the drug dog sniff and subsequent search unreasonably prolonged their initial lawful detention. They point to *Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 2007-Ohio-1103, to support their position. In *Kavanagh*, the Ohio Supreme Court considered the delay caused by a drug dog sniff and concluded that it would be possible for the delay to unreasonably extend the search. Id. at

¶22. *Kavanagh* is distinguishable from this case, however, because of the nature of the initial stop. The stop at issue in *Kavanagh* arose from a traffic law violation. Id. At ¶29. The stop here arose from an informant's tip. A driver stopped for a traffic law violation may usually leave after the purpose for the stop ends because there exists an end to a traffic stop – issuing a citation or warning. Id. citing *State v. Robinette* (1997), 80 Ohio St.3d 234.

{¶21} The drug dog sniff of Hillman's vehicle did not unreasonably extend the stop. Instead, it provided additional information to the officers as they continued to act on the informant's tip. We note that the Hillmans concede in their brief that the drug dog's "positive alert would have given the officers reason to extend the duration of the search and to carry out a second search of the vehicle." They contend that we should not reach that point because the drug dog search unreasonably delayed the detention. Having reached the opposite conclusion, we agree with the Hillmans' concession.

{¶22} Additional information came to the officers as the search continued. After the drug dog alerted on the vehicle, the informant paged Agent Ellis. Agent Ellis learned from the informant that if no drugs were found in the vehicle, the Hillmans sometimes kept the drugs taped to their genitals. The officers now had additional pieces of information that changed the landscape – the additional information from the informant, the drug dog's alert, and the visit by a known drug dealer to the scene of the search.

{¶23} After no drugs were found in the vehicle following the second search, the decision was made to

strip search the Hillmans. The site of the traffic stop was not an appropriate location to perform a strip search, so Agent Ellis asked the Hillmans to accompany him to the Wayne County Justice Center. The Hillmans agreed to go to the Justice Center so that the police could conduct a strip search of their persons for drugs. Having given their consent, they should not be heard now to complain that this unreasonably extended their detention.

{¶24} When they arrived at the Justice Center, the Hillmans initially reversed course and stated that they would not consent to a strip search. They then agreed to the strip search and Dallas was searched first. Agent Ellis first performed a plain look search and then asked Hillman to bend down and squat. Hillman stated that he had a problem with his genitals. At that point, Agent Ellis saw a clear plastic baggie sticking out from under his testicles. Agent Ellis asked Hillman to hand him the baggie at which point Hillman turned and tried to get away. Agent Ellis reached down and grabbed the baggie.

{¶25} Derrick was then brought into the room. Upon seeing the baggie of crack, he removed his clothes. One baggie fell, as he disrobed and he removed another bag from his testicles. After the strip search was conducted and the drugs recovered, the Hillmans were placed under arrest.

{¶26} The drug dog sniff and strip search did not unreasonably extend the Hillman's detention.

De Facto Arrest

{¶27} The Hillmans argue their continued detention after multiple searches of their persons and of their vehicle resulted in no contraband being found and their transportation to the Justice Center for a strip search without their consent constituted a de facto arrest.

{¶28} "Whether a suspect is in custody depends on the facts and circumstances of each case." *State v. Dunn*, 9th Dist. No. 04CA008549, 2005-Ohio-1270, at ¶24, citing *State v. Darrell* (1987), 41 Ohio App.3d 286, 287. The test is "whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall* (1980), 446 U.S. 544, 554.

{¶29} Viewing the totality of the circumstances in the present matter, this Court finds that the trial court did not err in finding that "the Hillmans' continued detention did not result in their being placed in custody. A review of the record shows that Derrick consented to the initial search of the vehicle. There was no indication that there was a significant delay between the initial search of the vehicle and the drug dog sniff. The drug dog sniff of the vehicle indicated the presence of drugs in the vehicle. When no drugs were found in the vehicle after a second search, a strip search was appropriate. The strip search could not be performed at the location of the traffic stop, so it was necessary to transport the Hillmans to the Justice Center, and the Hillmans voluntarily went to the

Justice center.[1] Furthermore, although initially the Hillmans said they would not consent to the strip search, they later consented. Therefore, their argument that the police should have obtained a search warrant before performing the strip search is without merit. In light of their consent, no search warrant was needed. During the strip searches, crack cocaine was found on the persons of both Dallas and Derrick Hillman. At that point, they were placed under arrest.

{¶30} Given the above, this Court cannot conclude that the trial court erred in finding that Hillmans were not in custody until after the strip searches were performed.

Warrant for the Search

{¶31} Finally, the Hillmans argue that, notwithstanding anything else, the officers should have obtained a warrant prior to conducting the strip search. We need not reach this issue because the Hillmans consented to the search. The Hillmans agreed to go to the police station with the officers for the purposes of submitting to a strip search. After arriving at the police station, the Hillmans changed their minds, and, a short time later, they consented to the strip search. Because the Hillmans consented to the search, the police did not need to obtain a warrant. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219.

---

[1] In their brief, the Hillmans characterize their transportation to the Justice Center as the "involuntary." However, the only evidence presented at the suppression hearing was Agent Ellis' testimony.

III.

{¶32} The trial court did not err when it denied the Hillmans' motions to suppress. Therefore, the Hillmans' assignment of error is overruled. The decision of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

/s/
DONNA J. CARR
FOR THE COURT

SLABY, J.
MOORE, J.

CONCUR

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellants.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

APPENDIX C

**IN THE COURT OF COMMON PLEAS,
WAYNE COUNTY, OHIO**

**CASE NO. 05-CR-0488
05-CR-0489**

[Filed October 26, 2006]

STATE OF OHIO	)
	)
Plaintiff	)
	)
vs.	)
	)
DERRICK HILLMAN	)
DALLAS HILLMAN	)
Defendants	)
	)

DECISION

This is a ruling on defendants motion to suppress the search of them at the Justice Center on November 14, 2005. The court has reviewed the transcripts of the evidentiary hearings and the applicable law.

FACTS

There is no real dispute as to the facts. The court will not restate them here.

ISSUE

The issue is whether the detention of the defendants was constitutional. Clearly, the detention on Spink Street was within Terry and its progeny. But it's the continuation of the detention (from Spink Street to the Justice Center) after no drugs were found on the defendants or in their vehicle which is at issue. The State argues that probable cause existed to arrest the defendants. The assistant prosecutor argues in her brief as follows: "Clearly officers had probable cause to arrest the defendants on November 14, 2005. The informant's information was verified, officers had a positive alert from a properly trained and certified drug dog, and Agent Ellis had been told the drugs were taped to the genitals of the defendant". This is a close question, but the court does not believe that the police had probable cause to arrest the defendants for possession of drugs after they concluded the Spink Street part of their investigation.

But were the facts sufficient to justify the continued detention of the defendants by transporting them to the Justice Center for a strip, search?

The scenario faced by the officers was that everything the informant had told them thus far had been true. Dallas Hillman drove a black Lincoln Navigator accompanied by another black male to the area of Spink Street and Nold Avenue in Wooster. They arrived about the time stated by the informant.

The police were unable to find drugs on the Hillmans or in the Navigator despite an "alert" on the vehicle by a trained drug dog. The informant then told the police that "they usually have it taped to their

balls". It should also be noted that when questioned earlier by separate officers, the defendants gave conflicting accounts as to why they were in Wooster.

Were the actions of the police reasonable under these facts? Did they cross the line and turn an investigatory detention into a *de facto* arrest?

The purpose of a Terry stop is for police to investigate possible criminal activity. Here the police were told by the informant that the Hillmans were coming to Wooster to sell drugs. The informant provided good information. The police had an alert by a drug dog, but could find no drugs. The informant then tells them that the drugs are probably taped to the defendants' testicles. They needed to do a strip search. Spink Street, in the middle of the afternoon, was not an appropriate place to do a strip search. The Justice Center was only a few minutes away. The entire detention took 1 hour and 12 minutes.

The Supreme Court in U.S. v. Sharpe, 470 U.S. 675 (1985) explained the standard of reasonableness and how to assess if the detention is too long. Examine "whether the police, diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant".

The court finds under the circumstances that the extended detention was reasonable and thus did not constitute an unreasonable seizure in violation of the 4th Amendment.

The motions to suppress are denied.

These cases are set for jury trial on **November 27, 2006 at 8:30 AM.**

IT IS SO ORDERED:

/s/_____
Mark K. Wiest, Judge

Date: 10/26/06

OPPOSITION BRIEF

21

(2)

Supreme Court, U.S.
FILED
FEB 17 2009
OFFICE OF THE CLERK

No. 08-949

In the Supreme Court of the United States

Derrick Hillman and Dallas Hillman,
Petitioners,

v.

State of Ohio,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF IN OPPOSITION

Martin Frantz
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Attorneys for Respondent

February 12, 2009

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was the continued detention of the defendants proper in order to allow a drug dog to search their vehicle after police received information that the defendants were transporting drugs in the vehicle from a known informant who provided accurate information about the defendants and no significant delay occurred in waiting for the drug dog to arrive?

2. Did the lower courts err in finding the strip search appropriate when the defendants consented to such a search?

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INTRODUCTION

The petition presents no sound basis for this Court to exercise jurisdiction, as the law in this area is well-settled and petitioners are simply unhappy with the results below. There is no conflict between jurisdictions. There are no unsettled questions of constitutional law or questions of great importance presented by the petitioners. This is a simple case in which the petitioners are disputing the factual findings made by two lower courts and the application of those facts to well-established rules of law. The State of Ohio respectfully requests that this petition be denied as there is no justifiable reason presented by the petitioners as to why this petition warrants review.

OPINIONS BELOW

The order of the Supreme Court of Ohio declining jurisdiction in this case is attached as Appendix A. [*State v. Hillman*, 119 Ohio St.3d 1505, 895 N.E.2d 567, 2008-Ohio-5467]. The opinion of the Ohio Court of Appeals for the Ninth Appellate District is attached as Appendix B. [*State v. Hillman*, 2008-Ohio-3204]. The opinion of the Wayne County Municipal Court is unreported and attached as Appendix C.

COUNTER-STATEMENT OF THE CASE

I. The Factual Background

Medway Drug Enforcement Agency (hereinafter 'Medway') is a law enforcement agency that operates in various counties in Ohio, including Wayne County. On November 15, 2004, a senior agent with Medway learned that Dallas Hillman and another black male would be driving a black Lincoln Navigator to Wooster, Ohio, arriving at 1:00 p.m. According to the source, the two men would be bringing crack cocaine from Cleveland to sell in Wooster. [April 25, 2006 Transcript at 4-5]. The source said the men planned to drop the drugs at a residence located at the intersection of Spink Street and Nold Avenue. [April 25, 2006 Transcript at 4, 13]. This residence was known to the Medway agent as the home of Michael Hall. [April 25, 2006 Transcript at 13].

At the time of the hearing, this particular agent had been with Medway for approximately eight years and testified to thousands of hours of drug enforcement training. [April 25, 2006 Transcript at 4]. He considered the informant, in this case, to be reliable and testified that he had personally worked with the informant once in the past. [April 25, 2006 Transcript at 5]. The agent testified that Medway had worked with the informant numerous times in the past, which resulted in the location of contraband, such as drugs. *Id.* Upon receiving this information from the informant, the Medway agent contacted Wooster Police, who helped put Michael Hall's residence under surveillance. [April 25, 2006

Transcript at 5].

At approximately 1:00 p.m. that day, the informant again called the agent and said the men were running late because they had to stop at a store and add minutes to their cell phones. [April 25, 2006 Transcript at 6]. He said they would arrive approximately one-half hour to one hour late.

In accordance with the time frame given by the informant, Wooster Police observed a black Lincoln Navigator with two black males approach Wooster between 1:30 p.m. and 2:00 p.m. that day. *Id.* According to the vehicle registration, the car belonged to a Cleveland resident. Officers followed the vehicle to the home of Michael Hall, pulled the vehicle over, and both men were asked to step out. [April 25, 2006 Transcript at 7]. Derrick Hillman was the driver. Dallas Hillman was in the passenger seat. *Id.* Upon disembarking, the Hillmans were told that law enforcement had received information that two men fitting their description were bringing drugs into the area to sell. [April 25, 2006 Transcript at 7, 29]. They were asked if they had any drugs in the vehicle; the Hillmans said that they did not. [April 25, 2006 Transcript at 29].

The two men were separated. One Medway agent spoke with Derrick Hillman and another with Dallas Hillman. Derrick Hillman told law enforcement that they were in Wooster because they were going to the Lodi Outlet Mall, north of Wooster. But, he explained, since they had never been to Wooster, they decided to come and see the city. Dallas Hillman, on the other hand, told law enforcement that the men were in Wooster to meet a guy named Steve to build a kick box. [April 25, 2006 Transcript

at 12].

Derrick Hillman was asked for consent to search the Navigator for drugs; he agreed. [April 25, 2006 Transcript at 7, 8, 29]. The K-9 dog was brought to the area, while officers conducted a preliminary search of the vehicle and found nothing. [April 25, 2006 Transcript at 8]. When the K-9 arrived, it alerted on an inside panel of the vehicle. [April 25, 2006 Transcript at 8-9]. Evidence showed this particular K-9 had been specially trained in narcotics detention and was recertified every two years. [May 1, 2006 Transcript at 4].

During the consensual vehicle search is being conducted, the Medway agent received a phone call from the informant who said that if the drugs are not in the vehicle, the two men usually keep the packages taped to their testicles. [April 25, 2006 Transcript at 9].

Dallas Hillman was sitting in a police cruiser. Michael Hall, the resident of the house where the vehicle was stopped, approached the vehicle and asked to speak with Mr. Hillman. [April 25, 2006 Transcript at 13]. This raised suspicion since the Hillman's had never been to Wooster and were just passing through. Additionally, officers knew that Michael Hall has been previously convicted of drug trafficking. *Id.*

Based upon the information given by the informant, the conflicting stories given by the Hillmans, the K-9 alert, and the familiarity exhibited by Michael Hall, the two men were asked to accompany officers to the Wayne County Justice Center in order to conduct a strip search for possible drugs. [April 25, 2006 Transcript at 10, 32, 33].

Both men agreed to do so. *Id.* Derrick and Dallas Hillman were taken to an interview room at the Justice Center and asked to remove their clothing. *Id.* The men initially refused and said they were going to fight the officers, but later agreed. *Id.* A plain look search was first conducted on Dallas Hillman. During this search, Dallas was asked to bend down and squat, at which time a clear plastic baggie was observed tucked underneath his testicles. [April 25, 2006 Transcript at 11]. Mr. Hillman was asked to remove the bag, at which time he turned and started to run. The baggie was removed by officers and placed on the table. *Id.* The bag contained crack cocaine.

Derrick Hillman was searched. *Id.* When Derrick Hillman saw the bag of crack cocaine on the table, he took off his clothes and removed two bags of crack cocaine which he had taped to his testicles, without being asked. [April 25, 2006 Transcript at 12].

From the time of the initial stop to the time the drugs were surrendered to police, approximately one hour and 12 minutes elapsed. [April 25, 2006 Transcript at 13].

II. The Procedural Background

The Hillmans have not provided this Court with an accurate view of the holdings below. The trial court found that an extended detention took place when the Hillmans were transported to the Wayne County Justice Center for the strip search. This prolonged detention was justified, according to the trial court, under *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, and *US v. Sharpe*, 470

U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605.

On appeal, the Ninth District Court of Appeals for Ohio upheld the trial court's finding that continued detention of the defendants was proper, noting that the drug dog sniff did not unreasonably extend the stop. The Ninth District Court of Appeals found that the Hillmans consented to the strip search, and could not complain that they were unreasonably detained. Although the Hillmans may have changed their minds upon arriving at the Wayne County Justice Center, they later agreed to the strip search. Neither the trial court, nor the appellate court, found that the continued detention of the Hillmans resulted in a *de facto* arrest.

Further review by the Ohio Supreme Court was denied. This is a case of applying the facts to well-settled law. There are no issues of public concern or points of law in need of clarification. The trial court and Ninth District Court of Appeals arrived at the same conclusion using the same well-settled law.

REASONS FOR DENYING THE WRIT

The petition should be denied for the following reasons.

The Hillmans ignore relevant facts relied on by the underlying courts, as well as long established law. This is not a case where there was a lack of basis for the belief that criminal activity was afoot, as is apparent from the above facts. Nor is this a case where the Hillmans were detained on the street for over an hour while police were unable to find any evidence of drug trafficking. The evidence is clear that police had reasonable cause to suspect drug

trafficking by the defendants. The evidence is also clear that the entire ordeal took one hour and twelve minutes, including the time to transport the defendants to the Justice Center and the time it took to conduct two separate strip searches. Two lower courts made well-reasoned findings based upon applicable law that this detention was neither unreasonable nor unconstitutional. Unfortunately, the Hillmans conveniently ignore the facts and law relied upon by the lower courts which do not weigh in their favor.

This is a simple case of applying facts to well-settled law. There is no unanswered constitutional question. There is no conflict among jurisdictions. There is no question of great public concern. There has been absolutely no reason given by the Hillmans as to why this matter warrants review by this Court, other than their belief that the lower courts arrived at the wrong result. Without a showing that there is unsettled law, unanswered constitutional questions, conflicts among the jurisdiction, or matters of significant public concern, there is no reason for this Court to take on a simple case of applying the facts in this case to well-recognized law, as two lower courts have already done.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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February 12, 2009

APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 2008-1519

[Filed October 29, 2008]

State of Ohio	)
	)
v.	)
	)
Derrick Hillman and Dallas Hillman	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Wayne County Court of Appeals; Nos. 07CA0048 and 07CA0049)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C. A. Nos. 07CA0048, 07CA0049

[Dated: June 30, 2008]

STATE OF OHIO	)
	)
Appellee	)
	)
v.	)
	)
DERRICK HILLMAN	)
and	)
DALLAS HILLMAN	)
	)
Appellants	)
	)

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE Nos. 05-CR-0488 05-CR-0489

DECISION AND JOURNAL ENTRY

CARR, P. J.

Appellants, Derrick and Dallas Hillman, appeal from their convictions and sentencing in the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶1} On November 15, 2004, Senior Agent Charles Ellis of the Medway Drug Enforcement Agency ("Medway") received information from a confidential informant that Dallas Hillman and another black male would be arriving in Wooster around 1:00 p.m. that day driving a black Lincoln Navigator. According to the informant, the two men would be transporting crack cocaine from Cleveland to sell in Wooster. The informant gave Agent Ellis an address of a residence where the two men were going to be dropping off the drugs. Agent Ellis recognized the address as the residence of Michael Hall. Agent Ellis knew that Hall had previously been convicted of drug trafficking. Based on his past experience with this informant and the fact that Medway had worked successfully with this particular informant on multiple occasions in recovering contraband, Agent Ellis considered him to be reliable.

{¶2} Agent Ellis contacted the Wooster Police Department for assistance. Wooster Police put the residence under surveillance. Around 1:00 p.m., the informant contacted Agent Ellis to let him know that the two men would be arriving approximately one-half hour to one hour late. Around the time the two men were to arrive, Wooster Police observed a black Lincoln Navigator with two black males inside approaching Wooster. The police ran the plate, and the registration belonged to a resident of Cleveland. The police followed the vehicle to Hall's residence and pulled it over.

Derrick Hillman was driving the vehicle and Dallas Hillman was in the passenger seat. The police explained to the men that they had received a tip that they were transporting drugs into the area for sale. The two men complied with the officer's request that they exit the vehicle. Upon exiting the vehicle, the Hillmans were searched. When asked, the two men stated that there were no drugs in the vehicle.

{¶3} Agent Ellis asked Derrick Hillman for consent to search the vehicle for drugs; Derrick consented to the search. Derrick and Dallas were questioned separately regarding their reason for being in the area and they gave conflicting stories about why they were there – one said it was to go shopping and the other answered that they were there to meet a guy to build something.

{¶4} During the initial consent search of the vehicle, Officer Brian Waddell, a member of the City of Wooster's canine unit, was contacted to bring his drug dog to search the vehicle. No drugs were found in the vehicle by the officers, but the dog became more aggressive walking around the outside of the vehicle and alerted on an inside panel of the vehicle. Officer Waddell indicated that because the dog did not have a strong reaction, the drugs may not be in the car but they were probably with the passengers. Because of the dog's alert on the vehicle, the police searched it again.

{¶5} During the second search of the vehicle, approximately 15 to 30 minutes after the initial stop, Agent Ellis spoke with the confidential informant who had paged him. The informant told Agent Ellis that if

the drugs were not in the vehicle, the two men usually kept the packages taped to their testicles.

{¶6} At some point during these events, Michael Hall approached one of the police cruisers to speak with Dallas. Agent Ellis testified that the police knew Hall to be involved in drug trafficking in the area. According to the confidential informant, Hall's residence was the Hillmans' destination with the drugs.

{¶7} Based upon the information from the informant, the conflicting stories from Dallas and Derrick, the drug dog alert on the vehicle, and Hall asking to speak with Dallas, Agent Ellis asked the Hillmans to go to the Wayne County Justice Center for a strip search; they agreed to go.

{¶8} When they arrived at the Justice Center, the Hillmans initially stated that they would not consent to a strip search and said they would fight the officers. The Hillmans finally agreed to the strip search and Dallas was searched first. After Dallas removed his clothes, Agent Ellis looked over Dallas. Agent Ellis asked him to squat down and he replied that he had a problem with his genitals. Agent Ellis then saw a clear plastic baggie sticking out from under Dallas' testicles. Agent Ellis asked Dallas to give him the baggie, Dallas attempted to get away and Agent Ellis reached down and grabbed the baggie.

{¶9} Derrick was then brought into the interview room to be searched. Upon seeing the bag of crack on the table, Derrick removed his clothes and the officers recovered two bags of crack, one small bag and a larger bag hidden under his testicles. The Hillmans were

then placed under arrest for possession of drugs and conveyance of drugs onto the grounds of a detention facility.

{¶10} From the time of the initial stop until the drugs were seized, approximately one hour and twelve minutes elapsed.

{¶11} The Hillmans were each indicted by the Wayne County Grand Jury on one count of possession of crack cocaine, a violation of R.C. 2925.11. The Hillmans initially pled not guilty and filed a motion to suppress any and all evidence seized as a result of their stop, detention, arrest, and search. A hearing on the Hillmans' motion to suppress was held on April 25 and May 9, 2006, during which Agent Ellis testified concerning the reliability of the confidential informant. The trial court denied the motion to suppress. The Hillmans subsequently withdrew their pleas of not guilty and, entered pleas of no contest. The trial court accepted the Hillmans' no contest pleas, found them guilty, and sentenced them accordingly.

{¶12} The Hillmans timely filed a joint notice of appeal with this Court on February 5, 2007. This Court dismissed the appeal for lack of final appealable orders pursuant to this Court's decision in *State v. Miller,* 9th Dist. No. 06CA0046-M, 2007-Ohio-1353. *State of Ohio v. Dallas and Derrick Hillman,* 9th Dist. Case Nos. 07CA0010, 07CA0019. The trial court subsequently issued journal entries in the Hillmans' cases which complied with our decision in *Miller.* The Hillmans then filed separate notices of appeal. Upon the Hillmans' motion, this Court consolidated the two appeals for purposes of filing the record, briefing, and

presenting oral argument. The Hillmans have set forth one assignment of error for review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION TO SUPPRESS AS THE EVIDENCE WAS UNLAWFULLY FOUND IN VIOLATION OF THE FOURTH AMENDMENT."

{¶13} In their only assignment of error, the Hillmans argue that the trial court erred in denying their motion to suppress.

{¶14} In reviewing a trial court's determination of a motion to suppress, "the ultimate questions of whether an officer had a reasonable suspicion to make an investigatory stop and whether an officer had probable cause to make a warrantless search are to be reviewed by an appellate court de novo." *State v. Gutierrez* (July 17, 1996), Medina App. No. 2515-M, citing *Ornelas v. United States* (1996), 517 U.S. 690. We review the trial court's findings of fact for clear error with due weight given to inferences drawn from those facts by judges and law enforcement officers. Id. After determining those facts known to the officer at the time of the stop, the appellate court must decide whether those facts would objectively give rise to a reasonable suspicion justifying a stop. Id.

{¶15} In their motion to suppress, the Hillmans argued that the police lacked reasonable suspicion to pull over their vehicle. The Hillmans also contend that

the tip from the confidential informant lacked sufficient indicia of reliability to justify the stop. This Court disagrees.

{¶16} A police officer may make an investigative stop of an individual if he reasonably suspects that the individual is involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 22. This standard also applies to investigatory stops of automobiles. *United States v. Brignoni-Ponce* (1975), 422 U.S. 873; *United States v. Cortez* (1981), 449 U.S. 411. "Where, as here, the information possessed by the police before the stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299. The question before us is whether the tip itself had sufficient indicia of reliability to justify the investigative stop. We consider several factors "highly relevant in determining the value of [the informant's] report'" including "the informant's veracity, reliability, and basis of knowledge." Id. (quoting *Illinois v. Gates* (1983), 462 U.S. 213, 230).

{¶17} Agent Ellis testified at the suppression hearing. Agent Ellis testified that although he had only worked with this particular informant on one other occasion, Medway had worked with him numerous times. Agent Ellis stated that on the previous occasions, the information provided by the informant had led to the recovery of contraband such as drugs. In this case, the confidential informant identified the type of vehicle, the time the vehicle would arrive, the destination of the vehicle, the number of occupants, the identity of one of the occupants, and the location of the drugs. After

reviewing Agent Ellis' testimony, this Court finds that the tip Agent Ellis received had sufficient indicia of reliability to justify the investigative stop.

Continued Detention Was Proper

{¶18} The Hillmans next argue that, assuming the tip from the confidential informant had sufficient indicia of reliability to justify the stop, their continued detention after the initial search of their persons and of the vehicle revealed no evidence of criminal activity was improper. This Court disagrees.

{¶19} This Court first notes that the Hillmans voluntarily exited their vehicle and Derrick consented to the initial search the vehicle. During the initial search of the vehicle, the reasonableness of which is not challenged, Officer Brian Waddell, a member of the City of Wooster's canine unit, was called to bring his drug dog to the scene to perform a routine drug sniff of the vehicle.

{¶20} During the drug dog sniff, Officer Waddell's dog alerted to the vehicle. Officer Waddell informed Agent Ellis that he did not have a strong alert which indicated that the drugs were probably on the Hillmans. The vehicle was searched again after the dog alerted to it, but no drugs were found. The Hillmans complain that the drug dog sniff and subsequent search unreasonably prolonged their initial lawful detention. They point to *Blue Ash v. Kavanagh,* 113 Ohio St.3d 67, 2007-Ohio-1103, to support their position. In *Kavanagh,* the Ohio Supreme Court considered the delay caused by a drug dog sniff and concluded that it would be possible for the delay to unreasonably extend the search. Id. at

¶22. *Kavanagh* is distinguishable from this case, however, because of the nature of the initial stop. The stop at issue in *Kavanagh* arose from a traffic law violation. Id. At ¶29. The stop here arose from an informant's tip. A driver stopped for a traffic law violation may usually leave after the purpose for the stop ends because there exists an end to a traffic stop – issuing a citation or warning. Id. citing *State v. Robinette* (1997), 80 Ohio St.3d 234.

{¶21} The drug dog sniff of Hillman's vehicle did not unreasonably extend the stop. Instead, it provided additional information to the officers as they continued to act on the informant's tip. We note that the Hillmans concede in their brief that the drug dog's "positive alert would have given the officers reason to extend the duration of the search and to carry out a second search of the vehicle." They contend that we should not reach that point because the drug dog search unreasonably delayed the detention. Having reached the opposite conclusion, we agree with the Hillmans' concession.

{¶22} Additional information came to the officers as the search continued. After the drug dog alerted on the vehicle, the informant paged Agent Ellis. Agent Ellis learned from the informant that if no drugs were found in the vehicle, the Hillmans sometimes kept the drugs taped to their genitals. The officers now had additional pieces of information that changed the landscape – the additional information from the informant, the drug dog's alert, and the visit by a known drug dealer to the scene of the search.

{¶23} After no drugs were found in the vehicle following the second search, the decision was made to

strip search the Hillmans. The site of the traffic stop was not an appropriate location to perform a strip search, so Agent Ellis asked the Hillmans to accompany him to the Wayne County Justice Center. The Hillmans agreed to go to the Justice Center so that the police could conduct a strip search of their persons for drugs. Having given their consent, they should not be heard now to complain that this unreasonably extended their detention.

{¶24} When they arrived at the Justice Center, the Hillmans initially reversed course and stated that they would not consent to a strip search. They then agreed to the strip search and Dallas was searched first. Agent Ellis first performed a plain look search and then asked Hillman to bend down and squat. Hillman stated that he had a problem with his genitals. At that point, Agent Ellis saw a clear plastic baggie sticking out from under his testicles. Agent Ellis asked Hillman to hand him the baggie at which point Hillman turned and tried to get away. Agent Ellis reached down and grabbed the baggie.

{¶25} Derrick was then brought into the room. Upon seeing the baggie of crack, he removed his clothes. One baggie fell, as he disrobed and he removed another bag from his testicles. After the strip search was conducted and the drugs recovered, the Hillmans were placed under arrest.

{¶26} The drug dog sniff and strip search did not unreasonably extend the Hillman's detention.

De Facto Arrest

{¶27} The Hillmans argue their continued detention after multiple searches of their persons and of their vehicle resulted in no contraband being found and their transportation to the Justice Center for a strip search without their consent constituted a de facto arrest.

{¶28} "Whether a suspect is in custody depends on the facts and circumstances of each case." *State v. Dunn*, 9th Dist. No. 04CA008549, 2005-Ohio-1270, at ¶24, citing *State v. Darrell* (1987), 41 Ohio App.3d 286, 287. The test is "whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall* (1980), 446 U.S. 544, 554.

{¶29} Viewing the totality of the circumstances in the present matter, this Court finds that the trial court did not err in finding that "the Hillmans' continued detention did not result in their being placed in custody. A review of the record shows that Derrick consented to the initial search of the vehicle. There was no indication that there was a significant delay between the initial search of the vehicle and the drug dog sniff. The drug dog sniff of the vehicle indicated the presence of drugs in the vehicle. When no drugs were found in the vehicle after a second search, a strip search was appropriate. The strip search could not be performed at the location of the traffic stop, so it was necessary to transport the Hillmans to the Justice Center, and the Hillmans voluntarily went to the

Justice center.[1] Furthermore, although initially the Hillmans said they would not consent to the strip search, they later consented. Therefore, their argument that the police should have obtained a search warrant before performing the strip search is without merit. In light of their consent, no search warrant was needed. During the strip searches, crack cocaine was found on the persons of both Dallas and Derrick Hillman. At that point, they were placed under arrest.

{¶30} Given the above, this Court cannot conclude that the trial court erred in finding that Hillmans were not in custody until after the strip searches were performed.

Warrant for the Search

{¶31} Finally, the Hillmans argue that, notwithstanding anything else, the officers should have obtained a warrant prior to conducting the strip search. We need not reach this issue because the Hillmans consented to the search. The Hillmans agreed to go to the police station with the officers for the purposes of submitting to a strip search. After arriving at the police station, the Hillmans changed their minds, and, a short time later, they consented to the strip search. Because the Hillmans consented to the search, the police did not need to obtain a warrant. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219.

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[1] In their brief, the Hillmans characterize their transportation to the Justice Center as the "involuntary." However, the only evidence presented at the suppression hearing was Agent Ellis' testimony.

III.

{¶32} The trial court did not err when it denied the Hillmans' motions to suppress. Therefore, the Hillmans' assignment of error is overruled. The decision of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

/s/_____
DONNA J. CARR
FOR THE COURT

SLABY, J.
MOORE, J.

CONCUR

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellants.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

APPENDIX C

**IN THE COURT OF COMMON PLEAS,
WAYNE COUNTY, OHIO**

**CASE NO. 05-CR-0488
05-CR-0489**

[Filed October 26, 2006]

STATE OF OHIO	)
	)
Plaintiff	)
	)
vs.	)
	)
DERRICK HILLMAN	)
DALLAS HILLMAN	)
Defendants	)
	)

DECISION

This is a ruling on defendants motion to suppress the search of them at the Justice Center on November 14, 2005. The court has reviewed the transcripts of the evidentiary hearings and the applicable law.

FACTS

There is no real dispute as to the facts. The court will not restate them here.

ISSUE

The issue is whether the detention of the defendants was constitutional. Clearly, the detention on Spink Street was within Terry and its progeny. But it's the continuation of the detention (from Spink Street to the Justice Center) after no drugs were found on the defendants or in their vehicle which is at issue. The State argues that probable cause existed to arrest the defendants. The assistant prosecutor argues in her brief as follows: "Clearly officers had probable cause to arrest the defendants on November 14, 2005. The informant's information was verified, officers had a positive alert from a properly trained and certified drug dog, and Agent Ellis had been told the drugs were taped to the genitals of the defendant". This is a close question, but the court does not believe that the police had probable cause to arrest the defendants for possession of drugs after they concluded the Spink Street part of their investigation.

But were the facts sufficient to justify the continued detention of the defendants by transporting them to the Justice Center for a strip, search?

The scenario faced by the officers was that everything the informant had told them thus far had been true. Dallas Hillman drove a black Lincoln Navigator accompanied by another black male to the area of Spink Street and Nold Avenue in Wooster. They arrived about the time stated by the informant.

The police were unable to find drugs on the Hillmans or in the Navigator despite an "alert" on the vehicle by a trained drug dog. The informant then told the police that "they usually have it taped to their

balls". It should also be noted that when questioned earlier by separate officers, the defendants gave conflicting accounts as to why they were in Wooster.

Were the actions of the police reasonable under these facts? Did they cross the line and turn an investigatory detention into a *de facto* arrest?

The purpose of a Terry stop is for police to investigate possible criminal activity. Here the police were told by the informant that the Hillmans were coming to Wooster to sell drugs. The informant provided good information. The police had an alert by a drug dog, but could find no drugs. The informant then tells them that the drugs are probably taped to the defendants' testicles. They needed to do a strip search. Spink Street, in the middle of the afternoon, was not an appropriate place to do a strip search. The Justice Center was only a few minutes away. The entire detention took 1 hour and 12 minutes.

The Supreme Court in U.S. v. Sharpe, 470 U.S. 675 (1985) explained the standard of reasonableness and how to assess if the detention is too long. Examine "whether the police, diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant".

The court finds under the circumstances that the extended detention was reasonable and thus did not constitute an unreasonable seizure in violation of the 4th Amendment.

The motions to suppress are denied.

These cases are set for jury trial on **November 27, 2006 at 8:30 AM.**

IT IS SO ORDERED:

/s/
Mark K. Wiest, Judge

Date: 10/26/06

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(3)

No. 08-949

FILED
MAR 13 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DERRICK HILLMAN AND DALLAS HILLMAN,
Petitioners,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Ohio Court of Appeals for the Ninth Judicial District

PETITIONERS' REPLY BRIEF

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RESPONSE ARGUMENTS

I

Assuming the "investigative stop" of a motorist can be justified on the basis of information supplied by an informant, where after a full and complete search of the vehicle (including the use of a drug dog) is completed more than an hour later, any further detention of the people involved require probable cause to arrest?

II

Assuming a consent to search is given, such consent to search can be revoked at anytime prior to the commencement of the search itself?

PETITIONERS' REPLY BRIEF

Here the facts are clear. A point here was reached when the petitioners were forcibly taken from the street scene where the police had searched them and their vehicle for contraband. This occurred in the wake of an investigative vehicle stop. The lawfulness of this stop and the ensuing searches are not under challenge. Indeed, it is conceded that they (*i.e.*, the Hillman brothers) originally consented to the searches that occurred following the traffic stop. On the other hand, one of the issues in the failed Appeal, which ruling is also being challenged here, is that the detention that occurred in the wake thereof was rendered illegal because of the inordinate extension of the time involved. Concededly this issue was resolved against Petitioners.

In any event, the issue that dominates here centralizes the cogent fact that the Court credited proof that showed once the Hillman brothers were transported to the police station for the purpose of a strip search, they made it emphatically clear they were not consenting to any such search. Indeed, as put by the Court: having once given their consent they could not be heard to complain that this extended their detention. (**Opinion, Appendix "B," ¶23**[1]).

Here, of course, it is an indisputable fact that the State bears the burden of proving any consent it relies on was freely and voluntarily given. Simply put, the facts to be considered are easily put. It starts with the idea that if these officers had probable cause to arrest, there would have been no need for the State to contend, as it does, these officers had their consent. So postured several dispositive facts are clear enough. First off, there is no dispute any consent these officers had before the officers conducted their search and located the contraband and this was seasonably repudiated, *i.e.*, it was withdrawn. With this being so the alleged consent the State contends they had occurred could only have occurred after some considerable prompting. Perforce, it was characterized by either, repeated requests, coercion or the like. Also, included would be the fact that before that happened they were placed in custody.

Clearly, as the Court recognized was the case, once they were delivered to the station ". . . the Hillman's initially reversed course and stated they would not

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[1] The Appendix references herein are to the Appendices to the Petition for Writ.

consent to a strip search" (**Id., ¶24**). This staunch position they were credited with punctuating with the thought, not only, that "they would not consent to a strip search," but as the Court further noted it was also said, "they would fight the officers" (**id., ¶8**) if they tried to force them.

Thus, it is significant here that not only did the State fail to offer any proof as to why the brothers capitulated, what is even more compelling is the fact, that the Court of Appeals would regard any prior consent as having been cast in stone, and as such was impervious, to being revoked. Indeed, if it were otherwise, then one has to wonder if this Court can live with the following quote from the Opinion:

> {**¶29**} Viewing the totality of the circumstances in the present matter, this Court finds that the trial court did not err in finding that "the Hillmans' continued detention did not result in their being placed in custody. A review of the record shows that Derrick was no indication that there was a significant delay between he initial search of the vehicle and the drug dog sniff. The drug dog sniff of the vehicle indicated the presence of drugs in the vehicle. When no drugs were found in the vehicle after a second search, a strip search was appropriate. The strip search could not be performed at the location of the traffic stop, so it was necessary to transport the Hillmans to the Justice Center, and the Hillmans voluntarily went to the Justice Center. Furthermore, although initially the Hillmans said they would not consent to the strip search, they later consented. Therefore, their argument that the police should have

> obtained a search warrant before performing the strip search is without merit. In light of their consent, no search warrant was needed. During the strip searches, crack cocaine was found on the persons of both Dallas and Derrick Hillman. At that point, they were placed under arrest.
>
> {¶30} Given the above, **this Court cannot conclude that the trial court erred in finding that the Hillmans were not in custody until after the strip searches were performed**.

(Opinion. Appendix "B," at ¶12a-13a.) (Emphasis supplied.)

Clearly then, if the Hillmans were not in custody, then given their adamantly expressed unwillingness to be strip-searched, it follows no basis existed for detaining them - - even momentarily. With this being so, and despite this expressed refusal, they were nonetheless searched. The facts then show it inexorably follows the resultant circumstances surely amounted to at least a submission to a show of official authority of some type. And, if they consented, this force was sufficient to persuade them to believe that unless they did so, they would be placed in some sort of jeopardy.

In any event, the issue that dominates here centralizes the cogent fact that the Court literally credited proof that showed once the brothers were transported to the police station for the purpose of a strip search they made it clear they were not consenting to any such search. Indeed, as put by the

Court that having once given their consent "they should not be heard to complain. . . ." (**Id., ¶23**).

I

EVEN ASSUMING AN INVESTIGATIVE STOP CAN BE JUSTIFIED ON THE BASIS OF INFORMATION SUPPLIED BY AN ALLEGED TO BE RELIABLE INFORMANT, AFTER THE OFFICERS HAD CONCLUDED (AS PUT BY TRIAL COURT): "THE STREET PART OF THE INVESTIGATION," ABSENT PROBABLE CAUSE ANY FURTHER DETENTION OF THESE PARTIES CAN NOT BE JUSTIFIED IN THE ABSENCE OF PROBABLE CAUSE - - TO ARREST OR TO SEARCH.

Given that arguably all contact between citizens and the police, especially on a public street, are inherently coercive, and given there were at least seven (7) law enforcement officers, with four (4) vehicles at this stop (**tr., pp. 7, 8, 18, 19, 37,** and **41**), which must be coupled with the fact that it was for more than an hour that these brothers were detained, in restraints, there on the street (which seated separately in a police car). Thus, who can say what effect all this had on them. With all this being so, to believe these individuals consented to this treatment can be likened to believing in the tooth fairy.

With this being so, the fact that no one can even divine (from the clashing positions taken by the prosecutor before the trial Court, *and* the contrary positions taken by the trial Court and the reviewing

Court) an acceptable legal basis for the denial of the Motion to Suppress is disturbingly clear. This follows because clearly anyone given a lengthy sentence, the case here, should have the satisfaction of knowing the Courts involved in determining their fate were not only aware of the controlling constitutional tenets involved in their case, but that they were aptly and informatively applied to their case.

Having said that, one thing seems most clear here. It is the fact that the police lacked probable cause to extend the detention once the searches made there on the street had been concluded. With this fact as a given, even if we suppose as the Court of Appeals proclaimed, Petitioners consented to being transported to the station to be stripped searched (**Appendix "B," at ¶¶7 and 8**), the fact remains, we must still deal with a certain reality. Clearly there is nothing in the Opinions rendered by Court's below that holds, or even suggests, the people were under arrest, or for that matter probable cause to arrest then existed. With this being so, then clearly their statement that they were not going to consent to being stripped and searched created a fact-specific issue that not only must be reckoned with, but is really dispositive.

This follows because it is axiomatically absent a valid arrest no right to search the persons of our Petitioners existed. And, the fact is the trial Court's finding was that no arrest occurred here "until the strip searches were performed" (**Appendix "C," at ¶13a**). Also, the fact that the Record shows the police were fully advised they would resist being searched. This fact as well, makes it manifest that this was as clear an indication as possible that any curtailment of their liberty from that point cannot be squared with

principles that distill from ***Mendenhall v. United States*, 446 U.S. 544 (1980).**

Here, as well, the facts are clear. A point here was reached when the petitioners were forcibly taken from the street where the police had searched them and their vehicle for contraband. This occurred in the wake of an investigative vehicle stop. The lawfulness of this stop and the ensuring searches are not under challenge. Indeed, it is conceded that the Hillman brothers (our Petitioners) originally consented to the searches that occurred following the traffic stop. Indeed, the position this is so has not even been challenged. On the other hand, one of the issues in the failed Appeal, which ruling is to be surely also being challenged here, is that the extended detention that occurred in the wake thereof was rendered illegal. And, this because of the inordinate extension of the time involved. Concededly this issue was likewise resolved against Petitioners. The Court's stated reasons why this is so is, of course, flawed and indefensible. (**Appendix "B," ¶21**).

In any event, the issue that dominates here centralizes the cogent fact that the Court credited proof that showed once the brothers were transported to the police station for the purpose of a strip search they made it clear they were not consenting to any such search. Indeed, as put by the Court that having given once given that they could not be heard to complain (**Id., ¶23.**)

II

ONCE ANY CONSENT TO SEARCH SUPPOSEDLY GIVEN IS REVOKED, ANY CAPITULATION WITH REFERENCE TO SUCH REVOCATION MUST BE ESTABLISHED BY UNEQUIVOCAL, INDEED SPECIFIC, PROOF THAT CONSENT WAS NOT ONLY FREELY GIVEN BUT WAS UNCONTAMINATED BY ANY COERCION OR DURESS.

In our view, in resolving this issue, the Courts below, and the prosecutor, failed to reckon with several critical facts. These are all the more important because of the finding that these Petitioners were not in custody, although they were being restrained. Our point here, which we deem critical, is that clearly they have failed to reckon, in their ratiocinations, with the fact that the Courts are obligated to indulge in a presumption against the waiver of constitutional rights.

In this regard, see ***United States v. Recalde*, 761 F.2d 1448, at 1453 (10th Cir. 1985)**. There the Court noted it was insignificant that "**Recalde** voluntarily accompanied the officers into" a particular location (**id., at 1455**), where the search occurred. As the Court saw it whether the alleged consent was voluntary must be determined under the totality of the circumstances and, it should be noted, not unlike what occurred here, the Court in **Recalde**, likewise "made no specific finding except that [he] had consented to the search at the station" (**id., p.1453, n. 4**).

Indeed, the State does not even attempt to show what evidence the Courts could be relying on for the conclusion that despite rescinding the prior consent, supposedly that had been given, they later changed their minds. . . [and] later agreed to be strip-searched (**Brief in Opposition, p. 6**). The significance of this finding, albeit flawed, lies I the fact that it is a concession that no probable cause existed to arrest or search. This follows because given the intrusive of the forceful detentions of the Brothers at this point (**opinion, Appendix "B" ¶23 to ¶30.**)

In the other hand, what was said by the Tenth Circuit in **Recalde** is especially apt. here. There the Court recognized in that case that there was a point where " the consensual aspects of the encounter had evaporated and this detention had exceeded the bounds of an investigative stop" (**Id., 761 F 2d, at 1456**). Because this is so, it renders ridiculous the Appeals Court's summary conclusion that the Brothers consented. Stated another way, as that court must be putting it, the Hillman brothers consented and their finding this was so is really the onbly finding required. The fact that no basis for this conclusion was set forth shows the Court regarded this gross omission as being irrelevant.

CONCLUSION

The bottom line here and we so contend, is that on this record there was no rational basis for the Trial Court to deny the Suppress Motion. And there was even less of a basis for the action taken by the Court of Appeals. While all that is bad enough, the positions taken by counsel for the State is ever worse. Indeed, rather than argue which of these courts counsel felt

got it right. Rather, this is wrong. We are being told none of these issues raised deserve this Court's attention. Clearly, what the court of Appeals also did wrong, and so did counsel – opposite, is that they focused only on the alleged consent aspect of this scenario. Both, totally ignored the significance of the lack of probable cause, to, either seize or arrest. See ***Dunaway v. New York*, 442 U.S. 200, at 216 – 217 (1979); and *Brown v. Illinois*, 422 U.S. 590, at 603 (1975)**. Also see ***U.S. v. Mendenhall*, 446 U.S. 544 (1980)**. Simply put, the Court's preoccupation with consent, which it summarily resolved, blinded it, to a basis reality. The facts are clear. Once the Hillmans, who were not under arrest (as these courts put it, they were free to leave – or should have been. Why that is not so is something that is beyond pontification. And, that is all we have from the State and the Courts. Clearly they believe it is enough that this is a drug case so what is the problem with this result?

Respectfully submitted,

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